

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35129

STATE OF IDAHO,)	2009 Unpublished Opinion No. 713
)	
Plaintiff-Respondent,)	Filed: December 7, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
DANIEL LEE LEHL,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Judgment of conviction for lewd conduct with a child, affirmed.

Molly J. Huskey, State Appellate Public Defender; Erik R. Lehtinen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

LANSING, Chief Judge

Daniel Lee Lehl appeals from his conviction for lewd conduct with a minor child under sixteen in violation of Idaho Code § 18-1508. He contends that prosecutorial misconduct during closing argument warrants a new trial. We affirm.

Lehl was charged with molesting his three or four-year-old niece by manual-genital contact. The child, then five, testified at trial that Lehl put his finger in her vagina while the two were lying down in Lehl's bed and that this made her mad. The child disclosed Lehl's conduct to her mother, later talked to her mother and father together, and was eventually interviewed by CARES, a child abuse investigation agency.

During closing argument, the prosecutor stated, in essence, that in evaluating the child's testimonial credibility the jury had the child's statements made at these three previous times to "review." Lehl did not object. On appeal, Lehl contends that this argument was improper and constitutes fundamental error because to the extent that the child's prior statements were actually

admitted at trial, they were admitted for the limited, non-hearsay purpose of explaining the actions subsequently taken by the listeners. Therefore, argues Lehl, the prosecutor improperly discussed as substantive evidence matters that were admitted for a limited evidentiary purpose.

Lehl also posits error in another component of the closing argument where the prosecutor told the jury that the CARES videotaped interview of the child had been given to the defense and that if the child had “said something that was so incredibly different than what she testified here in court, believe me, you would have known about it.” Lehl objected, but his objection was overruled. On appeal he argues that the prosecutor’s argument improperly attempted to shift the burden of proof to the defense.

It is improper for a prosecutor to argue as substantive evidence matters that were admitted for a limited evidentiary purpose. *State v. Hairston*, 133 Idaho 496, 507-08, 988 P.2d 1170, 1181-82 (1999); *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). Distortion at closing argument of the State’s burden to prove guilt beyond a reasonable doubt is likewise improper. *State v. Raudebaugh*, 124 Idaho 758, 769, 864 P.2d 596, 607 (1993); *Phillips*, 144 Idaho at 86, 156 P.3d at 587. Alleged prosecutorial misconduct to which no objection was made at trial will be considered on appeal only if it constitutes fundamental error. Prosecutorial misconduct amounts to fundamental error if it “goes to the foundation or basis of a defendant’s rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive.” *State v. Christiansen*, 144 Idaho 463, 470, 163 P.3d 1175, 1182 (2007); *State v. Bingham*, 116 Idaho 415, 423, 776 P.2d 424, 432 (1989). It has also been described as: “error that goes to the foundation or basis of a defendant’s rights,” *State v. Kenner*, 121 Idaho 594, 597, 826 P.2d 1306, 1309 (1992), and “error which ‘so profoundly distorts the trial that it produces manifest injustice and deprives the accused of his constitutional right to due process,’” *State v. Sheahan*, 139 Idaho 267, 281, 77 P.3d 956, 970 (2003) (quoting *State v. Mauro*, 121 Idaho 178, 180, 824 P.2d 109, 111 (1991)). Prosecutorial misconduct will be deemed harmless, however, if the appellate court is convinced beyond a reasonable doubt that the result of the trial would have been the same if the misconduct had not occurred. *Christiansen*, 144 Idaho at 471, 163 P.3d at 1183.

We elect not to address the merits of Lehl’s arguments here because, even assuming that any of the prosecutor’s arguments were improper for the reasons asserted by Lehl, any such misconduct was harmless. The evidence of Lehl’s offense was overwhelming. In addition to the

child's testimony, there was evidence that Lehl made multiple admissions to committing the offense. Two police officers testified that during a consensual interview, Lehl eventually admitted caressing the child's unclothed vaginal area to "calm her down." During the interview, the officers suggested that Lehl should write an apology letter to the victim. Thereafter, Lehl wrote four letters of apology, one to the victim, one to God and Lehl's family, one to the parents of the victim, and one to one of the officers. The letters were mailed to the officer and all were placed in evidence at trial. In the letter to the victim Lehl stated, "When I touched you where I shouldn't have it was not your fault." The letter also said, "I only wanted to show you love, but instead hurt a lot of people," and "When you are older & married to someone you love it is O.K. to do what we did, but not otherwise." In the letters Lehl sought forgiveness for his "moment of weakness," explained that the same thing had happened to him when he was a child, said that he had acted out of love for the child, and promised to "never again do any bad thing in my life" and to seek treatment. After the interview, Lehl checked himself into a hospital psychiatric unit for treatment. A clinical social worker at the facility testified that Lehl stated that he had touched the child's vaginal area under her clothing in an attempt to calm her down and that the child "wanted it."

Based upon Lehl's own multiple confessions and admissions, we conclude that if the alleged prosecutorial misconduct during closing argument had not occurred, the jury's verdict would have been the same. The alleged misconduct therefore was harmless beyond a reasonable doubt. The judgment of conviction is affirmed.

Judge GUTIERREZ and Judge GRATTON **CONCUR.**